FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 9, 2001

AMERICAN COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 2000-111-R
	:	Citation No. 7572545; 6/26/2000
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2000-112-R
ADMINISTRATION (MSHA),	:	Citation No. 7572546; 6/26/2000
Respondent	:	
	:	Galatia Mine
	:	Mine ID 11-02752

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION

These cases are before me on Notices of Contest filed by American Coal Company under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(d). American Coal contests the issuance of two citations by an MSHA inspector charging that diesel engines used in its underground coal mine did not comply with regulations governing approval for such use. The parties have stipulated to certain facts and have moved for summary decision, pursuant to Commission Procedural Rule 67. 29 C.F.R. § 2700.67. The Secretary has supported her motion with additional factual assertions contained in affidavits and related materials. I find that there exists no genuine issue as to any material fact and that the Secretary is entitled to judgment as a matter of law.

Facts

The parties stipulated to the following facts:

1. Contestant, American Coal Company, operates the Galatia Mine, a large underground coal mine located near Harrisburg, Illinois.

2. The Galatia Mine utilizes diesel powered personnel carriers.

3. The Mine Safety and Health Administration published a final rule on October 25, 1996, establishing new safety standards (30 C.F.R. §§ 75.1900-1916) and new approval regulations for diesel engines and equipment (30 C.F.R. Part 7) used in underground coal mines.

4. Part 7, Subpart E (30 C.F.R. §§ 7.81 through 7.92) establishes approval requirements for diesel powered engines in areas where permissible equipment is required (permissible diesel equipment), and for diesel powered engines used in areas where permissible equipment is not required (non-permissible diesel powered equipment).

5. The engines at issue in [these cases] are used in non-permissible diesel powered equipment.

6. As of November 25, 1999, non-permissible diesel powered equipment used in underground coal mines must meet the requirements of 30 C.F.R. § 75.1909.

7. Under 30 C.F.R. § 75.1909(a), non-permissible diesel powered equipment such as that which is the subject of the citations at issue here, must be equipped with engines approved under subpart E of 30 C.F.R. Part 7; this includes the approval marking requirement at 30 C.F.R. § 7.90.

8. The engines at issue in this case were manufactured and placed in use before the November 25, 1999 effective date for § 75.1909(a).

9. The engines at issue in [these cases] were manufactured by American Isuzu Motors, Inc.

10. American Isuzu Motors, Inc. applied for and received MSHA approval under Part 7 Subpart E for diesel engine model numbers Isuzu QD 100-301 and Isuzu C240MA (QD60).[1]

11. The American Coal Company and Galatia Mine do not have access to the approval documentation submitted by American Isuzu Motors, Inc. on which the MSHA approval under Part 7 Subpart E was based.

12. Extensive dialogue took place between local MSHA representatives and Galatia mine management regarding the quality of Isuzu's markings, the cost of obtaining the approval markings from Isuzu, and the development of an in house approval marking.

13. Marvin Nichols, MSHA Administrator for Coal Mine Safety and Health, issued a "Procedure Instruction Letter" (PIL) on April 1, 2000, which stated that all approval markings must be provided by the engine manufacturer. This PIL also addressed the poor quality of the approval marking being provided and the actions being taken to rectify this situation.

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[1] MSHA approved Isuzu's application for engine model number QD 100-301 (also known as 4DB1PW) on January 15, 1998. The application for engine model number C240MA (also known as C240PW) was approved on April 28, 1999.

14. The American Coal Company did not obtain Part 7 approval markings from Isuzu. Instead, the maintenance department at the Galatia Mine purchased and utilized a labeling machine to produce what it believed to be a suitable tag, and marked its Isuzu diesel engines with tags it produced with this labeling machine.

15. On June 6, 2000, MSHA issued Citation No. 7572545, alleging that the Contestant's Isuzu 4BD1 PW diesel engine in the MT13 diesel mantrip was not being maintained in accordance with Subpart E of 30 C.F.R., Part 7. A legible and permanent approval marking as required by 30 C.F.R. § 7.90 was installed but it had not been supplied by the engine manufacturer.

16. The serial number of the diesel engine which was the subject of Citation No. 7572545 is 201526.

17. On June 26, 2000, MSHA issued Citation No. 7572546, alleging that the Contestant's Isuzu C240PW diesel engine in the PV 55 diesel personnel carrier was not being maintained in accordance with Subpart E of 30 C.F.R., Part 7. A legible and permanent approval marking as required by 30 C.F.R. § 7.90 was installed but it had not been supplied by the engine manufacturer.

18. The serial number of the diesel engine which was the subject of Citation No. 7572546 is 814472.

The following additional facts are established by Affidavits submitted by the Secretary.

Isuzu's 4DB1PW diesel engine has been manufactured since before 1980 and continued in production until 1998. The C240PW engine was first manufactured prior to 1980 and has continued to be produced to present. Over time, changes may be made in the manufacture of a particular model engine, such as changes in parts used, settings or configuration of the engine. Consequently, engines with the same model number are not necessarily identical. For example, during the years that the 4DB1PW engine was manufactured a change was made to the camshaft. Some engines with that model number have the type of camshaft upon which the MSHA approval was based. Others do not. Only engines that have been manufactured in accordance with the design drawings and specifications submitted to MSHA can be approved and so marked pursuant to the regulations. For Isuzu to determine whether a particular engine was manufactured in accordance with the design drawings and specifications upon which MSHA's approval was based, it must compare the serial number of the engine with records it maintains of the design and specifications to which that engine was manufactured.

Accurate approval markings on diesel engines are critical to MSHA's enforcement of health and safety provisions designed to protect miners. In order to determine whether a mine has sufficient ventilation to dissipate emissions of a diesel engine used underground, an MSHA inspector must rely upon the engine's approval marking as establishing that it was manufactured according to the design and specifications approved by MSHA and that the ventilation rate

specified on the marking is accurate.

As noted above, the parties have stipulated that American Coal does not have access to the documentation submitted by Isuzu in its approval application. Nor does it appear that American Coal has access to Isuzu's records reflecting which engines of a particular model number were manufactured according to the design drawings and specifications for which the approval was obtained. The only way that American Coal could determine whether its engines had been approved was to apply to Isuzu for an approval marking. No application was ever submitted to Isuzu for an approval plate for either of the engines at issue in these cases and no such approval plate was ever issued by Isuzu.

American Coal was able to ascertain, from public records maintained by MSHA, that Isuzu diesel engines with the same model number as its engines had been approved by MSHA. Consequently, it fabricated its own approval marking and affixed it to the engines. MSHA determined that the approval markings did not comply with the regulatory requirement and the instant citations were issued. While the markings included the categories of information required by the regulation, MSHA enforced its interpretation of the regulation that the approval marking must be supplied by the manufacturer, and in the absence of such a marking, the engine was not approved, nor could it have any confidence that the engine had been approved.

Conclusions of Law

The ultimate issue in these cases is whether the approval marking required by 30 C.F.R. § 7.90 must be issued by the engine manufacturer. American Coal argues that the clear wording of the regulation[2] contains no such requirement, that the Secretary's attempt to incorporate such a requirement short of formal rulemaking must fail and that the identity of the entity that supplies the approval marking is "irrelevant" and "superfluous to the need addressed by the regulation." The Secretary argues that the intent of the regulation, as determined from the regulatory scheme, is that the marking must be issued by the manufacturer and that her interpretation of the

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[2] **§ 7.90 Approval marking.**

Each approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine. The marking shall contain the following information:

(a) Ventilation rate.
(b) Rated power.
(c) Rated speed.
(d) High idle.
(e) Maximum altitude before deration.
(f) Engine model number.

regulation is entitled to deference. The legal framework for resolving the issues was described by the Commission in *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (January 1998):

> Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted). *See also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v . FMSHRC*, 40 F.3rd 457, 463 (D.C.Cir. 1994). *Accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C.Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation [] and . . . serves a permissible regulatory function." *General Electric Co v. EPA*, 53 F.3d 1324, 1327 (D.C.Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C.Cir. 1989)). *See also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

See also, *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1059-61 (Sept. 2000).

Ambiguity

The regulation requires that each approved diesel engine bear a permanent approval marking showing the MSHA approval number and other information. American Coal correctly notes that the clear wording § 7.90 contains no requirement that the marking be issued by the manufacturer. However, neither does the regulation clearly state that the marking can be fabricated by the engine's owner, a supplier, or any other person or entity. The regulation itself, is silent as to the source of the approval marking.

The Secretary argues that the regulatory scheme discloses an intent that the marking must be supplied by the manufacturer, and that Contestant's interpretation would eviscerate the entire enforcement scheme to the detriment of miners' safety. As the Secretary points out, MSHA and its predecessor agencies have historically required that applications for approval of equipment for use in mines be submitted by the manufacturer. 30 C.F.R. Part 7 was originally promulgated in 1988 to establish the application procedure and requirements for MSHA approval of certain

products for use in underground mines. The preamble to the final rule for 30 C.F.R. Parts 7 and 18, specified that:

> Once MSHA has approved a product, the manufacturer is authorized to place an approval marking on the product that identifies it as approved for use in under ground mines. Use of the MSHA marking obligates the manufacturer to maintain the quality of the product. The MSHA marking indicates to the mining community that the product has been manufactured according to the drawings and specifications upon which the approval was based.

53 Fed. Reg. 23486 (June 22, 1988).

Only the manufacturer can apply to MSHA for approval of a diesel engine. 30 C.F.R. § 7.2 defines applicant as: "An individual or organization that manufactures or controls the assembly of a product and that applies to MSHA for approval of that product." Approval is defined as: "A document issued by MSHA which states that a product has met the requirements of this part and which authorizes an approval marking identifying the product approved." *Id*.

Applications for approval of diesel engines for use in underground coal mines must include extensive information on the engine's design and specifications as well as testing data. 30 C.F.R. § 7.83. Each approved product is required to have an approval marking and applicants are required to maintain records of the initial sale of each unit having an approval marking. *Id.* § 7.6. Once approval is obtained, an applicant, referred to as "the approval holder", is responsible for future quality assurance and for making the product available to MSHA for post-approval audit. *Id*. §§ 7.7 and 7.8.

Approvals are restricted to the specific design and specifications submitted by the manufacturer. For example, the MSHA approval for the Isuzu's model QD100-301 diesel engine states:

> All engines of this type that are marketed as approved under 30 C.F.R., Part 7, must be manufactured in accordance with the drawings and specifications on file at the Mine Safety and Health Administration and maintained in strict accordance with the instructions set forth in the engine maintenance and service manual. Any change in the design must be accepted in writing by the Mine Safety and Health Administration before you are authorized to make any such change.

While § 7.90 is silent as to the source of the approval marking, the regulatory scheme envisions that the manufacturer, the approval-holder, and the only entity that can determine whether a particular diesel engine satisfies the requirements of the MSHA approval, must issue the approval marking. Ambiguity exists when a regulation is capable of being understood by reasonably well-informed persons in two or more different senses. *Island Creek Coal Co.*, *supra*, 20 FMSHRC at 19. The regulation's silence creates ambiguity as to permissible sources for the approval marking.

The Secretary's Interpretation - Deference

It is well-established that the Secretary's interpretation of her own regulations in the complex scheme of mine health and safety is entitled to a high level of deference and must be accepted if it is logically consistent with the language of the regulation and serves a permissible regulatory function. *Kerr-McGee Coal Corp. v. FMSHRC,* 40 F.3d 1257, 121261-62 (D.C.Cir. 1994), *cert. denied,* 115 S.Ct. 2611 (1995); *Island Creek Coal Co., supra*, and cases cited therein.

For the reasons discussed above, the Secretary's interpretation of the regulation, i.e., that the approval marking must be issued by the manufacturer, is reasonable. There is also little question but that the Secretary's interpretation is more consistent with the safety promoting purposes of the Act. The Secretary argues, forcefully, that allowing operators or others to fabricate and affix approval plates would virtually nullify the Secretary's enforcement efforts in a critical area of safety and health. The operator cannot determine that a particular engine is covered by an MSHA approval because it has no way of determining whether the engine was manufactured according to the design drawings and specifications upon which the MSHA approval was based. Only the manufacturer, the approval-holder, can make that determination.

Even though American Coal could determine that engines of that model had been approved, it could not determine whether its engines had been manufactured according to the design and specifications upon which the approval was obtained. Consequently, it could not determine whether its engines had, in fact, been approved and an MSHA inspector attempting to determine whether a mine met applicable ventilation requirements for dissipating the emissions of Contestant's engines could not rely upon the marking fabricated by Contestant.

Due Process -- Fair Notice

> Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C.Cir. 1986).

Island Creek Coal Co., supra, 20 FMSHRC at 24.

American Coal does not, nor could it reasonably, assert that it was not afforded sufficient notice of the Secretary's interpretation of the regulation prior to the issuance of the citations here at issue. The Secretary's interpretation is consistent with the long-standing approval scheme for mining equipment, which contemplates that the manufacturer, as the approval-holder, is authorized to place the approval marking on the engine. Moreover, American Coal and other

operators were specifically put on notice of the Secretary's interpretation of this particular regulation. As the parties stipulated, there were extensive discussions between the Secretary and Contestant during which the requirement that the approval marking be obtained from the manufacturer was discussed. The issuance of the Procedure Instruction Letter, on April 1, 2000, clearly apprized operators of the Secretary's interpretation some two months prior to the issuance of the citations.

Based upon the foregoing, American Coal's motion for summary decision is denied, the Secretary's motion is granted, Citations numbered 7572545 and 7572546 are affirmed and the Notices of Contest are hereby **Dismissed**.

Michael E. Zielinski
Administrative Law Judge

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